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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, and RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES OF AMERICA, ... PETITIONERS,

VS:

PEOPLE OF THE STATE OF CALIFORNIA, EL REL STATE WATER RESOURCES CONTROL BOARD, and STATE OF WASHINGTON AND ITS DEPARTMENT OF ECOLOGY, ... RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF KENTUCKY, STATE OF GEORGIA, STATE OF HAWAII, STATE OF OHIO, AND COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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October Term, 1974

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MAY IT PLEASE THE COURT:

INTEREST OF THE AMICI CURIAE

The States represented in this Amici Brief have a common interest in the proper and effective implementation of their respective programs for the issuance of National Pollutant Discharge Elimination System permits

under the Federal Water Pollution Control Act Amendments of 1972. The States of Georgia, Ohio, and Hawaii have developed and submitted their programs to the Environmental Protection Agency and have been delegated authority to issue National Pollutant Discharge Elimination System permits subject to the same unreasonable and unauthorized exception which prompted the States of California and Washington to initiate this action.[1] The Commonwealth of Kentucky and the Commonwealth of Pennsylvania have not yet been delegated such permit issuing authority but anticipate that under current regulations of the Environmental Protection Agency any future approval of their programs would be made subject to the same limitation.

The water pollution control programs of each State

[1]The State of Ohio was granted authority to issue NPDES permits by a letter from the Regional Administrator, Region V, Environmental Protection Agency, dated March 11, 1974; the approval of the Ohio program was published in the Federal Register, Vol. 39, No. 137, page 26061, dated July 16, 1974. The State of Georgia was granted authority to issue NPDES permits by a letter from the Regional Administrator, Region IV, Environmental Protection Agency, dated June 28, 1974; the approval of the Georgia program was published in the Federal Register, Vol. 39, No. 137, page 26061, dated July 16, 1974. The State of Hawaii was granted authority to issue NPDES permits by a letter from the Regional Adminisrator, Region IX, Environmenal Protection Agency, dated November 28, 1974; the approval of the Hawaii program was published in the Federal Register, Vol. 39, No. 244, page 43759, dated December 18, 1974.

desiring to administer the National Pollutant Discharge Elimination System permit program for the navigable waters within their respective jurisdictions, including the amici States as well as respondents herein, must include at least the minimum standards and requirements specified in the Act. In developing these programs, the States have been, and are, required to meet all the criteria contained in Section 402 of the Act, 33 U.S.C. §1342, regulations promulgated by the Environmental Protection Agency pursuant to Section 304(h), 33 U.S.C. §1314(h), and Section 402, and the requirements of Section 303(e), 33 U.S.C. §1313(e), relating to the States' continuing planning process. In incorporating these measures into the State program and in carrying out and implementing these requirements to achieve the goals of the Act, the States must be able to control all point source discharges to navigable waters within their respective jurisdictions.

The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters;[2] primary responsibility for the achievement of this goal is vested in the States.[3] The means selected by the Congress for the attainment of this end is the regulation of all dischargers of pollutants through the opera-

[2]33 U.S.C. §1251(a); Section 101(a) of the Federal Water Pollution Control Act of 1972.

[3]33 U.S.C. §1251(b); Section 101(b) of the Federal Water Pollution Control Act of 1972.

tion of the National Pollutant Discharge Elimination System permitting process. In Section 402 of the Act, 33 U.S.C. §1342, the Congress provided for the administration of this system through the operation of State control programs. In specifying the requirements to be incorporated into these State programs and providing for continuous review, the Congress has assured that these programs will be formulated and operated in accordance with the Act. Absent control over all sources discharging into navigable waters subject to the State's jurisdiction, the Administrator could not approve the program and the State could not effectively formulate or enforce the standards authorized by Section 510 of the Act, 33 U.S.C. §1370, and made applicable to Federal facilities by Section 313 of the Act, 33 U.S.C. §1323. The unwarranted and unauthorized refusal of the Administrator to relinquish permitting authority over point sources operated by the Federal government poses a serious hindrance to the effective and efficient implementation of the National Pollutant Discharge Elimination System with respect to the waters involved and thwarts State efforts to meet their responsibilities under the Federal Water Pollution Control Act.

Amici herein support the respondents and the Court of Appeals For the Ninth Circuit in the position that the refusal of the Administrator to delegate to the States authority to issue National Pollutant Discharge Elimination System permits with respect to the facilities of the Federal government is beyond the powers, and in conflict with

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the duties, of the Administrator under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1251, et seq.

SUMMARY OF ARGUMENTS

I. Section 402 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1342, establishes the National Pollutant Discharge Elimination System and contains the instructions of the Congress with respect to the administration and implementation of that system. Basic to the administration of the National Pollutant Discharge Elimination System is the right of the States to issue the NPDES permits required for discharges into the navigable waters subject to that State's jurisdiction. The Congress provided in Section 402(b) of the Act that the State could develop and submit for approval its program for the issuance of such permits and that if the Administrator found the program adequate he was to suspend his own issuance of permits with respect to such waters. The Administrator has disregarded this specific Congressional directive and has refused to relinquish permitting authority over facilities operated by the Federal government.

This refusal cannot be supported in the Federal Water Pollution Control Act and poses a serious hindrance to the effective implementation of State programs. These programs are designed to control all navigable waters within a State's jurisdiction and cannot be implemented without control over each source contributing to the pollution of such waters. Since NPDES permits are specifically required by the Act and such permits are to be issued by

the States, the requirements imposed under State programs are without doubt "requirements respecting control and abatement of pollution" within the meaning of Section 313 of the Act, 33 U.S.C. §1323. As such, they are requirements with which all Federal facilities must comply in accordance with the directives of the Congress.

II. The Supremacy Clause does not bar the State issuance of NPDES permits to facilities of the Federal government and is inapposite in this action for three reasons: (i) Federal facilities have been specifically subjected to the requirements of State regulatory programs in the area of water pollution control by Congressional waiver contained in Section 313 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1323; (ii) application of the Supremacy Clause in this action is contrary to the purposes of the clause since the requirements of State water pollution control programs do not in any way frustrate or pose an obstacle to the application of Federal law but rather were adopted in order to carry out the objectives of the Federal Water Pollution Control Act, as amended; (iii) in accordance with Section 402 of the Act, 33 U.S.C. §1342, the water pollution control programs of the respondents have been approved and such programs are operating under a direct, and authorized, delegation of Federal authority and are enforceable requirements of Federal law.

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ARGUMENT I

THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY HAS EXCEEDED HIS AUTHORITY UNDER THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972 IN REFUSING TO SUSPEND HIS ISSUANCE OF NPDES PERMITS TO AGENCIES AND INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT DISCHARGING POLLUTANTS TO NAVIGABLE WATERS LOCATED WITHIN STATES WHOSE WATER POLLUTION CONTROL PROGRAMS HAVE BEEN APPROVED PURSUANT TO SECTION 402 OF THE ACT, 33 U.S.C. §1342, AND ARE APPLICABLE TO SUCH POINT SOURCES OF DISCHARGE PURSUANT TO SECTION 313 OF THE ACT, 33 U.S.C. §1323.

In the Federal Water Pollution Control Act Amendments of 1972, the Congress enacted a comprehensive, multi-faceted, and clearly discernible plan designed to restore and maintain the quality of the waters of the United States. This plan involves first, the improvement and development of new waste water treatment and control technology through the conduct of research and the construction of demonstration projects for various treatment methods.[4] The Act also directs the expenditure of huge amounts of money in construction grants for needed waste water treatment facilities throughout the Nation.[5] In order to assure that technological developments and advances were properly implemented and that construc-

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[4]Federal Water Pollution Control Act Amendments of 1972, Title I — Research and Related Programs, 33 U.S.C. 1251-1265.

[5]Id. Title II — Grants for construction of treatment works, 33 U.S.C. 1281-1292.

tion grants were used to finance only needed and properly designed facilities, the Congress also instituted the National Pollutant Discharge Elimination System and made unlawful any discharge of pollutants not in conformity with a permit issued in accordance with this system. *Federal Water Pollution Control Act Amendments of* 1972, *Title IV — Permits and Licenses,* 33 *U.S.C.* 1341-1345, *and Title III — Standards and Enforcement,* 33 *U.S.C.* 1311-1328.

It is the proper administration and implementation of this system in accordance with the directives of the Congress, and the failure of the Administrator of the Environmental Protection Agency to effectuate these directions, which are involved in this action. The Court of Appeals For the Ninth Circuit has correctly declared invalid the administrative regulation upon which the Administrator relied in refusing to relinquish permitting authority over point sources operated by the Federal government and has placed the administration of the National Pollutant Discharge Elimination System permit program with the respondents herein as directed in the Act and as intended by the Congress.

The National Pollutant Discharge Elimination System (hereinafter referred to as NPDES) was established in Section 402 of the Act, 33 U.S.C. §1342, and that Section contains the instructions of Congress with respect to the administration and implementation of the system. The approach of the permit system is similar to that employed in other regulatory statutes; an act is declared unlawful and then a procedure is established through which the prohibition may be modified and the activity controlled

and regulated. In the Federal Water Pollution Control Act, Section 301, 33 U.S.C. §1311, makes unlawful the discharge of any pollutant except in compliance with Sections 301, 302, 306, 307, 318, 402 and 404 of the Act. However, Section 402(k), 33 U.S.C. §1342(k), provides that compliance with a permit issued pursuant to Section 402 is to be deemed compliance with Section 301, Section 302, Section 306, and Section 307. The discharge of pollutants from point sources is, therefore, unlawful except as authorized in an NPDES permit. Under this system, all point sources are required to obtain such permits, including point sources operated by the Federal government. Indeed, Federal dischargers have been regularly applying for National Pollutant Discharge Elimination System permits and even under the Administrator's interpretation would be expected to continue such applications and renewals.[4]

Initial permitting authority under the National Pollutant Discharge Elimination System clearly rests with the Administrator pursuant to Section 402(a), 33 U.S.C. §1342(a). However, in keeping with the State's responsibility for the control of water pollution for all waters within their jurisdiction, Section 402(b), 33 U.S.C. §1342(b), provides for the development of State programs for the issuance of National Pollutant Discharge Elimination System permits. In pertinent part, Section 402(b) of the Act, 33 U.S.C. §1342(b), provides:

> ". . . [t]he Governor of each State desiring to administer its own permit program for discharges into

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[4]See: Petitioners' Brief, page 10.

navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact . . . . The Administrator *shall approve* each such submitted program unless he determines that adequate authority does not exist." (Emphasis Added).

This section continues by describing the elements which must, as a minimum, be incorporated into each State program. The Administrator's duty is clear; if each prescribed measure is not contained in the plan, he should not approve the program, however, if the plan does include all the requisite authority, he "shall approve" the program submitted.

The instructions of the Congress with respect to the administration of the National Pollutant Discharge Elimination System are further continued in Section 402(c), 33 U.S.C. §1342(c), of the Act, which reads, in pertinent part:

"(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator *shall suspend* the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under Section 304(h)(2) of this Act." (Emphasis Added).

Again, the Administrator's duties are clear and his actions are mandatory; unless he finds the State program deficient, he "shall suspend" his own issuance of permits

for those navigable waters subject to the State program.

The clear and explicit instructions of the Congress are not, however, reflected in the regulations promulgated by the Administrator. In regulations promulated in 40 C.F.R., Part 124, the Environmental Protection Agency set forth "State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System."[7] These regulations are, in part, inconsistent with the Federal Water Pollution Control Act Amendments of 1972 in that they attempt to authorize a dual permitting system which is not contemplated in the Act and also that these regulations attempt to alter the jurisdictional base of the Act from navigable waters to point sources of discharge.

Section 402, 33 U.S.C. §1342, for instance, clearly limits the Administrator's alternatives to either approval or disapproval of a submitted State program. However, it is apparent from the provisions of 40 C.F.R. §124.10, and particularly the accompanying comment, that the Administrator does not acknowledge this constraint. 40 C.F.R. §124.10, and comment, read, in part, as follows:

"Prohibition of discharges into State waters:

Except as provided in §124.11, any State or interstate program participating in the NPDES must have a statute or regulation, enforceable in State courts, which prohibits discharges of pollutants by any person except as authorized pursuant to an NPDES permit.

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[7]Published at 37 Federal Register 28390, December 2, 1972; amended by 38 Federal Register 17999, July 5, 1973, and 38 Federal Register 19894, July 24, 1973.

(Comment: . . . Except as provided in §124.11, exceptions to the general prohibition cannot be approved. Depending on their scope and nature, any such exceptions will either (1) constitute grounds for withholding approval of the entire submitted program until such time as the State or interstate agency revises or modifies its program to conform to this subpart, *or* (2) constitute categories, types, or sizes of point sources for which the Administrator will not suspend the issuance of NPDES permits. In the latter case, the Administrator will issue NPDES permits for those point sources not subject to the State or interstate agency's authority.)" (Emphasis Added)

This regulation, if implemented in accordance with the accompanying comment, clearly does not implement or conform to the provisions of Section 402. The authority to make a partial delegation is not contained in the Act and the jurisdictional criteria stated in Section 402 is related to navigable waters, not to point sources. These errors are repeated throughout the regulations and the application of these erroneous constructions effectively precludes the efficient implementation of the State programs authorized in Section 402(b), 33 U.S.C. §1342(b).

The jurisdiction of the States under their approved NPDES permit issuing programs is coextensive with that of the Administrator insofar as the control of point sources discharging to the navigable waters covered by the program is concerned. Section 402(c), 33 U.S.C. §1342(c), makes it perfectly clear that upon approval of the State's program the authority of the Administrator under Section 402(a), 33 U.S.C. §1342(a), is suspended with respect

to the *navigable waters* covered by the State program. The requirement that each point source obtain an NPDES permit is in no way effected by the delegation to the State of authority to issue such permits, *the only change is the idenity of the governmental entity implementing the program.*

Moreover, efficient implementation of any more stringent standards contained in a State's plan, and authorized in Section 510 of the Act, 33 U.S.C. §1370, necessitates that the State have control over all discharges to navigable waters within its jurisdiction. What petitioner suggests and advocates is that Congress intended that there be a dual permitting system with two separate agencies administering two separate water pollution control programs and issuing NPDES permits to separate point sources discharging to the same navigable waters. Coordinating such permit issuing powers creates incredible administrative entanglements and makes it impossible for either agency to conduct a cohesive and effective program for any particular water. Such a program is certainly not consistent with the streamlining of administrative processes for the implementation of the Act called for in Section 101(f), 33 U.S.C. §1251(f):

> "It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government."

Rather than decrease the traffic of paperwork and interagency decision making, the position of petitioner can

only increase such burdens and the experience of California with this dual system demonstrates that the imposition of more stringent State "substantive" requirements is impaired where the State does not issue all the permits for its waters. As shown by the Affidavit of Bill B. Dendy, the operation of the dual system has resulted in the issuance of NPDES permits which failed to incorporate permit conditions relating to substantive control and discharge standards of the California program.[8]

Further, the development of applicable substantive standards is hindered under the system currently operated. Interpreting the case of *California* v. *Davidson,* 3 E.R.C. 1157 (N.D. Cal. 1971), the United States Court of Appeals For the Ninth Circuit found that the determination of substantive requirements applicable to any particular source could ordinarily be accomplished only through the administrative process.[9] The Control strategies and effluent limitations to be applied must be tailored to the individual source after considering the design of the facility, the quantity and timing of its discharge, the nature and concentration of its discharge, and the existing state of the water into which the discharge is made. For instance, Section 303, 33 U.S.C. §1313, authorizes, indeed requires, the States to identify waters where the application of the effluent standards contained in Section 301, 33 U.S.C. §1311, are not stringent enough to meet minimum water quality standards and requires the computation of maximum daily pollutant loads and the permits issued must reflect effluent limitations based on planned waste load allocations and frequently incorporating additional controls such as timing and rate of discharge. The allocation of maximum daily pollutant loads among the various dischargers on a particular stream or stream segment simply cannot be made or effectively planned without control over each point source. The necessity that such control rest with the States is amplified by the wide variety of programs authorized under Section 510, 33 U.S.C. §1370.

In addition to providing for more stringent standards than those imposed by the Administrator, Section 510 also authorizes the State programs to be broader and to examine different factors than those considered by the Administrator. The standards set forth in Section 402(b), Section 303(e)(3), and in the regulations of the Administrator are the minimal requisites of State plans and form a floor, not a ceiling, for the State program. This relation has been recognized in the regulations of the Environmental Protection Agency:

> 40 C.F.R. §124.21 "Application for NPDES permit.
>
> Procedures of any State or interstate agency participating in the NPDES shall insure that every applicant

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[8]Affidavit of Bill B. Dendy, Appendix, pp. 40-42, cites two such NPDES permits issued by the Administrator. In discussing this Affidavit in a footnote to **California v. EPA, 511 F.2d 963, 966**, the Court below observed:

> "[t]he Administrator is continuing to screen such state-requested permit conditions, and apply his own notions of 'best practicable' and 'best available' technology and of what constitutes compliance 'to the fullest extent possible' in issuing permits to federal agencies, rather than the standards suggested by the state.' "

[9]**California v. EPA, 511 F.2d 963, at 967 (9 CA, Feb. 13, 1975).**

for an NPDES permit complies with NPDES filing requirements. Such procedures and requirements shall include the following:

(a) Except as provided in paragraphs (b) and (c)(4) of this section and except as provided by the Administrator in regulations issued under the act, any person discharging or who proposes to discharge pollutants shall complete, sign, and submit an NPDES application short form in accordance with the instructions provided with such form.

COMMENT. Federal filing requirements for the NPDES include the timely filing of a properly completed Refuse Act or NPDES application form. State and interstate agencies may specify, where necessary, additional filing requirements such as the submission of engineering reports, plans, and specifications for present or proposed treatment or control of discharges of pollutants. While duplication should be avoided, the Administrator recognizes that the NPDES application form may not by itself satisfy the needs of every participating program."

The Administrator expressly recognizes in this regulation that this additional information may be necessary to carry out the State program even though not necessary to his own Section 402(a) permit issuing program. However, these additional requirements are no less a part of the National Pollutant Discharge Elimination System under Section 402(b). 33 U.S.C. §1342(b), than the requirements of the Administrator's program and as part of the approved programs for the issuance of the permits they are requirements with which all applicants, including

Federal dischargers, must comply. Recognition of State procedures applicable to all applicants for NPDES permits is also found in 40 C.F.R. §124.42:

> "Application of effluent standards and limitations, water quality standards, and other requirements.
>
> (a) Procedures for any State or interstate program participating in the NPDES must insure that the terms and conditions of each issued NPDES permit apply and insure compliance with all of the following, whenever applicable:
>
> . . .
>
> (4) Any more stringent limitation, including those (i) necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulation (under authority preserved by section 510), or (ii) necessary to meet any other Federal law or regulation, or (iii) required to implement any applicable water quality standards; such limitations to include any legally applicable requirements necessary to implement total maximum daily loads established pursuant to section 303(d) and incorporated in the continuing planning process approved under section 303(e) of the Act and any regulations and guidelines issued pursuant thereto.

The only limitation imposed by the Congress on the operation of these State water pollution control programs is that they must be at all times administered in a manner consistent with the Act and impose standards at least as stringent as those in the Act and the regulations of the

Administrator. Section 402, 33 U.S.C. §1342, contains provisions designed to give just such assurances. Section 402(c)(2), Section 402 (c)(3), and Section 402 (d) provide that the Administrator is to carry out a continuing review of the State programs and of permits issued or proposed under these programs and gives him authority to withdraw his approval if the program is not administered in accordance with the Act. Again, the Administrator's alternatives are to approve or disapprove the program; nowhere is there any authority to retain his Section 402(a) authority to issue permits for any source discharging to a navigable water subject to an approved State program.

The applicability of the State program to all sources of pollutant discharge is mandated by Section 402,, 33 U.S.C. §1342, and guaranteed in Section 313, 33 U.S.C. §1323. In that section, the Congress has declared that facilities of all branches of the Federal government shall comply with all the "requirements respecting control and abatement of pollution" which are imposed on any other person discharging to the waters of any particular State or locality. In pertinent part, Section 313, 33 U.S.C. §1323, reads as follows:

> "Each department, agency, or instrumentality, of the executive, legislative and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that

> any person is subject to such requirements, including the payment of reasonable service charges."

From this section, it is clear that if a requirement is a "requirement respecting control and abatement of pollution" it is a requirement with which Federal facilities shall comply. Nowhere in this section is there any basis for a distinction between substantive and procedural requirements of State law. Indeed, Section 402, 33 U.S.C. §1342, demonstrates the Congress was concerned with the implementation of full and complete *programs* of water pollution control and was concerned that such programs be properly *administered*.

The position maintained by petitioner herein totally precludes the operation of such a program. Petitioner suggests that facilities of the Federal government need only comply with the substantive effluent standards and compliance schedules promulgated by the State, and need not apply for State operating permits. This position, however, ignores the manner by which such standards are formulated and applied. The control strategies and effluent limitations applicable to any particular source can only be determined by reference to the nature of the source, its size, and location, the quality of the water into which the discharge flows, and the type and nature of the control equipment and treatment facilities available for such facilities. Such determinations cannot be made absent an administrative examination of the source and its circumstances. It is through the operation of the control program, therefore, that the standards which petitioner claims must be met are formulated and applied. This is particularly true where more stringent standards, authorized

pursuant to Section 510, 33 U.S.C. §1370, are to be imposed or where the effluent limitations promulgated by the Administrator pursuant to Section 301, 33 U.S.C. §1311, are inadequate to produce acceptable water quality.

Petitioner's restrictive interpretation of the phrase "requirements respecting control and abatement of pollution" is further undermined by the language imposing an obligation to pay "reasonable service charges." Petitioner's contention that this language contemplates only charges for the use of public treatment works does not relate to other language in Section 313, 33 U.S.C. §1323, and deprives this phrase of any operative effect whatsoever. In discussing this language and petitioners' contention that it referred to charges for the use of public treatment works, the Ninth Circuit Court of Appeals reasoned:

> "Although a state's taxing power cannot operate within the confines of a federal enclave without the consent of the United States, no serious contention has ever been made that subordinate governmental bodies must supply public utility services to federal agencies free of normal user charges. Hence, there would be no need for Congress to explicitly direct federal agencies to pay their full share of municipal sewer system costs. On the other hand, any permit program charges might be sufficiently in the nature of a tax that specific federal consent would be required before they could be certified as 'properly payable' federal obligations." (Citations omitted). 511 F.2d 963, at 970 (9 CA, February 13, 1975).

This interpretation of the reasonable service charge language is in accord with the principle of statutory con-

struction that where possible all the language of a statute should be given operative effect and meaning. See: *Washington Market Co.* v. *Hoffman,* 101 U.S. 112 (1879); *Jarecki* v. *G. D. Searle & Co.* 367 U.S. 303 (1961); *Weinberger* v. *Hynson, Westcott & Denning, Inc.,* 412 U.S. 609 (1973). In addition to being violate of this principle, the interpretation advanced by petitioner appears totally unrelated to the rest of Section 313, 33 U.S.C. §1323. This section is concerned with requirements which must be met by the discharger. The reference of the section is to charges relating to the imposition of State and local requirements, not to the operation of publicly owned treatment works. Thus, even where Federal agencies discharge through a publicly owned treatment works the charges referred to in Section 313 are properly read as incident to the imposition of the State or local requirements rather than the actual treatment process employed.

In lieu of compliance with the provisions of a State's water pollution control program, the petitioner herein urges that enforcement of the standards of the Act, including any more stringent "substantive" state standards is to be secured solely through court action pursuant to Section 505, 33 U.S.C. §1365. This approach is not, however, adequate to perform the functions of the State program. It does not provide any guidance in the determination and formulation of what standards should be applied to a particular source and is totally inadequate to assure that stringent State standards are implemented and enforced. Under NPDES permits issued by the Administrator pursuant to his Section 402(a) powers, the facilities of the Federal government could be insulated from any enforcement of the State's standards. Pursuant to

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Section 402(k), 33 U.S.C. §1342(k), compliance with the terms and conditions of a permit issued pursuant to Section 402 is deemed compliance with the Act for purposes of Section 505, 33 U.S.C. §1365. If, therefore, the conditions imposed by the Administrator on such an NPDES permit did not reflect the imposition of the State standards, the discharger could, at least arguably, escape these State programs entirely. As shown by the Affidavit of Billy B. Dendy, (Appendix, pp. 40-42), discussed at page 14 of this Brief and in footnote 8 herein, there have been instances where the Administrator has, indeed, failed to incorporate State recommendations into NPDES permits issued to point sources discharging to the navigable waters of California. In these instances, the administration and enforcement of the Act falls exclusively upon the Courts without any recourse to administrative processes.

In addition to providing an inappropriate Section 402(k), 33 U.S.C. §1342(k), defense, the contentions of the petitioner deny any operative effect to Section 313, 33 U.S.C. §1323. By equating the obligations imposed in Section 313 with those specifically actionable under Section 505, 33 U.S.C. §1365, petitioner effectively renders Section 313 a redundant and unnecessary restatement of Section 505 except as to the ability of the President to exempt complaince. Moreover, petitioner argues, based on exemptive language contained in Section 401, 33 U.S.C. §1341, that even Section 505 has limited application as to Federal facilities. However, this exemption demonstrates only that where the Congress wished to relieve the Federal government of a compliance obligation it did so expressly and in specific languag. No such language appears in

Section 313, 33 U.S.C. §1323, nor is there any exemption from State programs adopted and approved under Section 402, 33 U.S.C. §1342. The absence of such express exemption is especially significant in light of the Section 505(f) reference to permit conditions and Section 313 requirements. The judicial enforcement of such conditions necessarily and inescapably implies the administrative imposition of such requirements.

Administrative imposition of permit conditions is precisely what the Congress contemplated in Section 402 of the Act and the provisions of the State programs for the issuance of permits are clearly "requirements respecting control and abatement of pollution" within the meaning of Section 313, 33 U.S.C. §1323. As stated by the Court of Appeals for the Ninth Circuit:

> "[i]t would appear that the reference to Section 313 to federal agency compliance with state 'requirements' was purposeful and artistic, and was meant to refer to these requirements which state administrative agencies might adopt under their express Section 402 authorizations."

511 F. 2d 963, at 972 (9 CA, February 13, 1975).

ARGUMENT II

THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE VI, CLAUSE 2, DOES NOT BAR THE ISSUANCE OF NPDES PERMITS BY THE STATES TO AGENCIES AND INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT UNDER THE FEDERAL WATER POLLUTION CONTROL ACT OF 1972 AND DOES NOT PROVIDE A BASIS FOR THE ADMINISTRATOR'S FAILURE TO SUSPEND HIS ISSUANCE OF NPDES PERMITS FOR DISCHARGES INTO THE NAVIGABLE WATERS OF A STATE HAVING AN APPROVED WATER POLLUTION CONTROL PROGRAM.

There are at least three reasons why the Supremacy Clause does not operate to preclude the State issuance of National Pollutant Discharge Elimination System permits under the provisions of the Federal Water Pollution Control Act of 1972. First, Section 313 of the Federal Water Pollution Control Act, 33 U.S.C. §1323, expresses a clear Congressional waiver and specifically subjects Federal facilities to the requirements of State programs for the issuance of NPDES permits and other requirements respecting control and abatement of pollution. Second, application of the Supremacy Clause in this action is contrary to the policy supporting the rule since the issuance of NPDES permits by these States does not frustrate Federal law, the evil against which the Supremacy Clause protects. Third, the programs for the issuance of these Federal permits which were submitted by California and Washington have been approved by the Administrator of the Environmental Protection Agency and the Administrator is mandated to delegate his authority to issue such permits.

The power of the Congress to waive the immunity of the Federal government under the Supremacy Clause is clear. As was stated in *Mayo* v. *United States,* 319 U.S. 441, 446, 63 S.Ct. 1137, 1140, 87 L.Ed. 1504, 1508 (1943):

> "It lies within Congressional power to authorize regulation, including taxation, by the state of federal instrumentalities."

In this case, Congress has enacted such a waiver. In enacting Section 313, 33 U.S.C. §1323, the Congress has declared clearly, explicitly, and most affirmatively, that Federal facilities "shall comply" with State water pollution control requirements:

> "Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or run-off of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges. The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a requirement if he determines it to be in the paramount interest of the United States to do so; except that no exemption may be granted from the requirements of section 306 or 307 of this Act. No such exemptions shall be granted due to lack of appropriation unless the President shall have specifically requested

> such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting such exemption."

It is difficult to imagine how Congress could have made a more affirmative declaration that the facilities of the Federal government were subject to the requirements of State pollution control programs than was made in this section. The uncompromising and unlimited language employed leaves no room for discretion; if the requirement is a "requirement respecting control and abatement of pollution", it is a requirement to which Federal facilities are subject. Certainly, the elements of a State program for the issuance of permits required under the Act are "requirements respecting control and abatement of pollution."

In the case of *Alabama* v. *Seeber*, 502 F. 2d 1238, 1243 (1974), the Court of Appeals For the Fifth Circuit construed substantially identical language from the Clean Air Act Amendments of 1970 and concluded:

> "The phrase 'shall comply with . . . State . . . requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements' effectively conveys a Congressional intent that federal facilities are to be treated equally

> with private facilities in the scheme of control established by the Act. Recognizing that in particular instances such treatment might prove inconsistent with the national interest, the section provides for executive exemption from any requirements.'

Similarly, the Court below herein ruled the language of the Section 313, 33 U.S.C. §1323, waiver was sufficiently clear and free from ambiguity and went on to state:

> "Section 313 also requires federal agencies to comply with state pollution control requirements 'to the same extent that any person is subject to such requirements.' Hence, the extent of the federal agency compliance duty can only be gauged from the type of program that section 402 of the Act demands that states institute for private dischargers." *California* v. *EPA*, 511 F. 2d 963, at 970 (9 CA, February 13, 1975).

Further, with respect to the nature and scope of the requirements imposed under Section 313, the Court of Appeals For the Ninth Circuit concluded:

> "[I]t would appear that the reference in Section 313 to federal agency compliance with state 'requirements,' was purposeful and artistic, and was meant to refer to those requirements which state administrative agencies might adopt under their express Section 402 authorizations.' *California* v. *EPA, supra*, at 972.

The ability of Congress to employ broad and uncompromising language in waiving Federal Supremacy and subjecting Federal facilities to State regulation was also established in *Baltimore National Bank* v. *State Tax Commission*, 297 U.S. 209 (1936). The issue presented in

that case was the power of a State to tax shares in a national bank which were held by an instrumentality of the Federal government. The Court held that the State did have such a power, and based its holdings on the fact that Congress had consented to this taxation by statute. The language of this statute indicated that "all" the shares of a national banking association whose principal place of business is within the limits of a State are subject to taxation at the discretion of that State's legislature. From this, the Court reasoned that shares held by an agency of the Federal government were taxable. In the instant case, the language of Section 313, 33 U.S.C. §1323, is even more explicit in indicating the consent of Conress to waive any insulation that a Federal facility might possess under the Supremacy Clause. Section 313 expressly provides that the Federal facilities are subject to local "requirements" in pollution matters. This is a clear and unequivocal waiver of any Federal primacy under the Supremacy Clause.

The application of the Supremacy Clause is also inappropriate in this case because the regulations which California and Washington seek to impose do not in any way act to frustrate or thwart the application of Federal law, but rather are in furtherance of and were adopted pursuant to Federal law. In the case of *Perez* v. *Campbell,* 402 U.S. 637 (1971), this Court quoted with approval the standard for determining whether a State statute was in conflict with the Supremacy Clause first enunicicated in *Hines* v. *Davidowitz,* 312 U.S. 52 (1941):

> "'In the final analysis,' our function is to determine whether a challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Perez* v. *Campbell, supra,* at 649.

See also: *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (1963); *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 224 (1964); *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967).

Applying the *Hines* test to the instant case, there is no question that these requirements do not conflict with Federal law since it is through the application of the State programs for the issuance of National Pollutant Discharge Elimination System permits that the objectives and goals of the Federal Water Pollution Control Act are to be obtained. In fact, it was at the specific direction of Congress that these plans were formulated and adopted. Under these circumstances, the Supremacy Clause is clearly not a bar to this action to secure compliance with the programs of California and Washington for the issuance of National Pollutant Discharge Elimination System permits.

Finally, the Supremacy Clause is inapposite in this case because the States have been delegated authority to administer the requirements of the Federal Act. The water pollution control programs of the States have not been adopted *sua sponte* in the provincial exercise of police powers, but rather in direct response to Federal requirements and in order to qualify for the delegation of Federal authority to administer a Federal Act. Such a delegation of Federal authority in the administration of a Federal Act was upheld in *Stewart Machine Co.* v. *Davis,* 301 U.S. 548 (1937). In that case, the States had been delegated au-

thority to administer the provisions of a Federal program of unemployment insurance established under the Social Security Act of 1935, 42 U.S.C. §501-503. Similarly, the Federal Water Pollution Control Act, 33 U.S.C. §1251, et seq., directs that authority to issue NPDES permits is to be delegated to the States, providing the program operated by the States meets all listed requisites. The Administrator has found that the programs operated by the respondents herein do meet the requirements of Section 402 of the Act, 33 U.S.C. §1342, and yet has refused to suspend his own authority as directed in Section 402(c), 33 U.S.C. §1342(c). There can be no violation of the Supremacy Clause where, as here, Congress has explicitly authorized State regulation of Federal installations under a Federal Act. Despite the fact that the control programs are embodied in State law, the permits issued through the operation of these programs are Federal permits within the National Pollutant Discharge Elimination System and are enforceable by the Administrator and the Federal Courts as Federal requirements.

CONCLUSION

The failure of the Administrator to relinquish permitting authority over the Federal agencies and installations discharging pollutants to navigable waters covered by a State water pollution control program which has been approved pursuant to Section 402(b) of the Act, 33 U.S.C. §1342(b), deprives that State of its primary rights and responsibilities to prevent and reduce water pollution and to plan the development and use of land and water resources within its jurisdiction. The Administrator's act is contrary to both the explicit language of the Act and the policies which underlie it. Section 402(c), of the Act, 33 U.S.C. §1342(c), requires and mandates the Administrator to suspend his issuance of permits where there is an applicable State program approved under Section 402(b). The provisions of these programs for the issuance of NPDES permits are certainly "requirements respecting control and abatement of pollution" within the meaning of Section 313 of the Act, 33 U.S.C. §1323. Section 313, therefore, obligates the agencies of the Federal government to comply with the requirements of these programs just as if they were private citizens, and to the same extent. Operation of a successful program to clean up the waters of any State requires that the administering body have control over every point source discharge into those waters. It was the intent of the Congress that the States and not the Administrator were to be primarily responsible for achieving this goal. The Administrator's action thwarts the well and carefully conceived plan of the Congress and poses an obstacle and hindrance to the effective and efficient implementation of the Federal Water Pollution Control Act of 1972.

For these and the foregoing reasons, the Judgment of the United States Court of Appeals For the Ninth Circuit should be affirmed.

Dated: SEPTEMBER 30, 1975.

Respectfully Submitted,

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CERTIFICATE OF SERVICE:

The undersigned hereby certifies that the herein BRIEF OF THE COMMONWEALTH OF KENTUCKY, STATE OF GEORGIA, STATE OF HAWAII, STATE OF OHIO, AND COMMONWEALTH OF PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS was served by mailing three copies hereof, via United States Mail, air mail, postage prepaid, to: Honorable Robert H. Bork, Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable A. Raymond Randolph, Jr., Deputy Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Edmund B. Clark, Attorney, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Raymond N. Zagone, Attorney, Department of Justice, Washington, D.C., 20530; Honorable Raymond W. Mushal, Attorney, Department of Justice, Washington, D.C., 20530; Honorable Robert V. Zener, General Counsel, Environmental Protection Agency, Fourth and M Streets, S. W., Washington, D.C., 20460; Honorable Evelle J. Younger, Attorney General, State of California, Honorable Roderick Walston, Deputy Attorney General, State of California, Honorable Richard C. Jacobs, Deputy Attorney General, State of California, and Honorable Carl Boronkay, Assistant Attorney General, State of California, 6000 State Building, San Francisco, California, 94101; Honorable V. Frank Mendicino, Attorney General, State

of Wyoming, 210 State Capitol, Cheyenne, Wyoming, 82001, and Honorable Maryland S. Kite, Special Assistant Attorney General, State of Wyoming, Attorney General Office, 210 State Capitol, Cheyenne, Wyoming, 82001; Honorable Bronson C. LaFollette, Attorney General, State of Wisconsin, Department of Justice, State Capitol, Madison, Wisconsin, 53702; Honorable John J. Hill, Attorney General. State of Texas, Supreme Court Building, Austin, Texas, 78711; and Circuit Judge Eugene A. Wright, Circuit Judge Herbert Y. C. Choy, and Judge Burns, United States Court of Appeals For the Ninth Circuit, San Francisco, California, 94101, and further the undersigned hereby certifies that all parties required to be served in this action have been served, all this the 30 day of September, 1975.

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